SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-5931

POLISH AMERICAN CONGRESS AND
THADDEUS L. KOWALSKI,
Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents,

AMERICAN BROADCASTING COMPANIES, INC.,
Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

EDMUND A. GODULA
DOMINIK, KNECHTEL, GODULA
& DEMEUR
20 North Wacker Drive
Chicago, Illinois 60606
312/726-5344

THADDEUS L. KOWALSKI
120 South LaSalle Street
Chicago, Illinois 60603
312/332-6182
Attorneys for Petitioner

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Polish American Congress and Thaddeus L. Kowalski, respectfully pray that a writ of certiorari issue to review judgment entered on July 23, 1975 by the United States Court of Appeals for the Seventh Circuit in its Cause No. 74-1412.

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals is reprinted in the appendix at pages A1-14. The opinion of the Commission's Broadcast Bureau denied Petitioners' com-

plaint as reprinted in the appendix at pages A15-18; and the opinion following a full review by the Commission is reprinted in the appendix at pages A19-21 and appears at 46 FCC 2d 124 (1974).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was made and entered on July 23, 1975. The jurisdiction of this Court is invoked under 28 USC Sec. 1254(1).

QUESTIONS

1. Does not the mere recitation of "Polish jokes", necessarily result in assuming an unequivocal position which simultaneously creates a controversial issue, in view of the large audience and in view of the constant characterizations which identify "such jokes"?

2. Does an intention to amuse or a humorous context prevent recourse to the Fairness Doctrine when the humor, without exception, assumes a position that Poles are inferior, moronic, non-hygienic and loathsome, and there is a contrary position which should be presented in the public interest?

3. Does not the public interest aspect of the Fairness Doctrine require presentations of contrary views for balanced programming when Polish jokes are broadcast, and there is no controversy that such Polish jokes uniformly attack a large segment of the American population, in a unique and particularly vile manner?

4. Does not the public interest require an opportunity to present a contrary point of view in fairness to Polish American children who are particularly susceptible to one sided views which group them as vile members of our citizenry, a condemnation which far exceeds "poking fun at them"?

5. Can the personal attack corollary of the Fairness Doctrine be properly construed to view mere recitations of Polish

jokes as the presentation of a controversial issue of public importance?

6. Is it not reasonable to declare that the mere recitation of Polish jokes constitutes a personal attack within the Fairness Doctrine since, at least, significant numbers of the attacked persons, which comprise a significant percentage of the population, are expected to take a position contrary to the attacks, thus inherently creating a controversial issue of public importance?

STATUTE AND REGULATION INVOLVED

Title 47 USC Sec. 315, reading in pertinent part:

> "(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station . . .
>
> Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

Title 47 C.F.R. Sec. 73.123 Personal Attacks: Political Editorials, in pertinent part:

> "(a) When, during the presentation of view on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities."

STATEMENT OF THE CASE

Petitioners filed a complaint on June 28, 1973 before the Commission alleging that ABC violated the Commission's personal attack regulation during the August 10, 1972 broadcast of the Dick Cavett Show by demeaning attacks against the Polish American group.

A Federal Communications Commission staff decision of September 26, 1973 stated that publishing "Polish jokes" is not a controversial issue of public importance; and that such jokes do not constitute a personal attack against the group because the Commission Regulations require that a personal attack must go to the integrity, character, honesty or like personal qualities. The Commission adopted a memorandum, opinion and order on March 28, 1974 which affirmed the Bureau's ruling, following a request for a full hearing by the Petitioners. Such full Commission memorandum, opinion and order stated a Commission cannot promulgate any regulation to interfere with the freedom of expression by broadcasting; that ABC was not unreasonable in concluding that the broadcast of the jokes and attendant remarks did not constitute a discussion of a controversy of public importance; and that the personal attack rule must be predicated upon an attack upon those personal qualities bearing on the moral rectitude or personal credibility of a named individual or group.

Petitioners appealed to the Seventh Circuit Court of Appeals under Title 28 USC § 2342, and on July 23, 1975 the Seventh Circuit affirmed the memorandum, opinion and order of the Commission. The decision of the Seventh Circuit said Petitioners did not discharge the burden of showing that the recitation of these Polish jokes constituted a presentation of views on a controversial issue of public importance.

REASONS FOR GRANTING THE WRIT

I. The Jokes in and of Themselves Create the Controversy

Section 315(a) of Title 47 imposes an obligation upon broadcasters to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance. This section of the statute recites the basis for what has become to be known as the "Fairness Doctrine", and the Commission has adopted the personal attack corollary as set out in the appendix.

The Seventh Circuit Court of Appeals has denied Petitioners an opportunity to present an opposing point of view by severely and unreasonably contracting the meaning of the personal attack rule and ignoring the "public interest" mandate of the statute which should be reasonably construed to afford the relief requested.

It is the position of Petitioners that the mere recitation of Polish jokes by the broadcaster is a one-sided view of an issue of public importance in each and every instance that the Polish joke is broadcast. The mere recitation of these vile, demeaning stories creates a controversial issue by its very nature; and the mere recitation further assumes a point of view.

The position of the Seventh Circuit Court of Appeals is that Petitioners are not entitled to an opportunity to respond unless such an attack is made during a discussion of a controversial issue which, the Court suggested, might be a discussion whether Polish Americans are truly inferior, moronic, non-hygienic, and the possessors of "like personal qualities". Such a rigidly structured position violates the remedial purpose pursued by the statute and by the Commission's own Regulations.

The mere recitation of a Polish joke is controversial, and to deny same is to be totally unrealistic. The mere recitation of the Polish joke is of public importance, and to deny same is like-

wise to be unrealistic. Neither the Commission nor the Seventh Circuit Court of Appeals has denied or taken issue with Petitioners' basic argument that each and every Polish joke, without a single exception, cites at least one of the following traits:

(1) vile manners, habits or customs
(2) abject stupidity
(3) animal or moronic traits
(4) vulgar actions and dress

See also the summary of the broadcast jokes in the appendix at page A22.

Such uniform characterization of the Polish joke does not permit respondents to hide behind a plea that they only intended to amuse, or that no attack was intended. Dealing such attacks behind a pretense of humor does nothing to blunt the injury nor to belittle the attacked group before audiences. The Seventh Circuit Court of Appeals said that Petitioners failed to show that the attacks occurred during the discussion of a controversial issue, but ignored Petitioners' arguments that reason, logic and experience compel the view that the mere recitation of the Polish jokes is the presentation of one view on a controversial subject which is of major importance. The invariable attack of each and every Polish joke cannot be ignored, and the fact that upwards of 10 million Polish Americans are attacked by the presentation of each and every joke.

Can an attack occurring during the discussion of a controversy of public importance occur only in a predetermined context where participants must discuss whether Poles have vile manners, are abjectly stupid, have animal or moronic traits, or exhibit vulgar actions and expression? Petitioners assert that there is no present situation in which a controversial issue of public importance is presented. Neither the Commission nor the Seventh Circuit Court of Appeals have denied that the Polish joke is an attack. If so, why cannot this attack be deemed controversial since the broadcaster publishes it, and

then an important segment objects to the characterization of the published joke? Why cannot the mere recitation of this joke be deemed an issue of public importance since up to about 10% of the American population are characterized in the most unequivocal and demeaning terms? The Polish joke is unique and certain in each and every instance it is broadcast, therefore, Petitioners submit that it is correct and well within the meaning of the statute that mere recitation of such Polish jokes constitute an attack which is both controversial and of public importance. As long as such occurs, it is mere formalism to demand that such occur in a particular sequence, that is, first a serious discussion, then placing in issue the intelligence and personal habits of Poles, and finally attacking the Poles.

This Court has affirmed the personal attack regulation in *Red Lion Broadcasting Co., Inc. et al.* v. *FCC*, 395 U.S. 380. Petitioners now ask this Court to bring up the record so that the substance of this statute and the regulation may be protected against attempts to debilitate them with formalistic distinctions.

II. The Public Interest Obligation of the Statute Further Requires That Petitioners Be Granted an Opportunity to Respond

Petitioners asked the Seventh Circuit Court of Appeals to afford them an opportunity to respond, irrespective of the personal attack corollary of the Fairness Doctrine. This request was based on the Fairness Doctrine, that is, that balanced programming imposes an obligation on the broadcaster to present another view on a matter of public importance. Simply, repeated broadcasting of Polish jokes, by their unique identification, comprise a one-sided representation that adversely affects a substantial majority of the American population. Neither Respondents nor Intervenor have ever attempted to

argue that broadcasting of Polish jokes is only an incidental or rare occasion, consequently it is the Petitioners' view that they have been and are repeated activities, and such can be acknowledged by this Court. Further, the record below will categorically show a repeated dissemination of such jokes by broadcasters and the widespread concern expressed by numerous citizens and organizations, including those not associated with Polish culture or organizational connections.

The Commission invoked this public interest provision in the statute as applying to commercial announcements and advertisements in the *Cigarette Advertising* case, 9 FCC 2d 921 (1967), affirmed, *Banzhoff* v. *FCC*, 405 F.2d 1082 (1968), *cert. denied sub nom., Tobacco Institute* v. *FCC*, 396 U.S. 842. The Commission recognized that cigarette smoking represented a unique situation and the Commission knew of no other advertised product which would warrant a comparable ruling, p. 943. The Commission and the Seventh Circuit Court of Appeals, however, ignored the unique situation of the Polish joke which always includes a characteristic attacking element. There is nothing in the general field of humor, nor of ethnic humor, which is comparable to the Polish joke that licensee ABC has broadcasted. Can the Commission consistently find a unique situation in the *Cigarette Advertising* case to protect the health of the public, but not find a unique situation in broadcasting Polish jokes which adversely attack the mind and spirit of Polish Americans? The record below will show evidence of such injury, particularly to the Polish American children. A hearing would have confirmed beyond any doubts that such a one sided presentation results in an injury, but the Commission denied such a hearing to Petitioners.

This Court properly rejected the formalism of the "separate but equal" defense in the landmark case of *Brown, et al.* v. *Board of Education of Topeka*, Shawnee County, *Kansas et al.*, 347 U.S. 483 (1953):

> "To separate them from others of similar age and qualification solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." (p. 494)

The public interest provision of the statute has been unreasonably and incorrectly ignored by the Commission and the Seventh Circuit Court of Appeals because both refuse to acknowledge the truly unquestioned facts of injury to the most vulnerable Polish American group, the children. If any doubt as to such injury can be entertained, contrary to what Petitioners showed in the record below and contrary to any modest exercise of reasonableness, then such would be conclusively dispelled by a hearing which the Commission refused to grant Petitioners. This Court quoted approvingly the observations of the Lower Kansas Court at p. 494 in the *Brown et al.* case, *supra:*

> "A sense of inferiority affects the motivation of the child to learn."

The public interest provision of the statute should be correctly construed to allow Petitioners an opportunity to present a contrary point of view to counter the one side presentation which, unanswered, must lead to such a sense of inferiority. See also the view of Dr. Robert A. Mendelsohn of The University of Illinois School of Medicine in the appendix at pages A23-24.

CONCLUSION

The writ should issue to the Seventh Circuit Court of Appeals which unreasonably denied invocation of the personal attack corollary of the Fairness Doctrine on the basis that mere recitation of the Polish joke is not a presentation of a controversial view of public importance. Such writ should likewise issue because the public interest obligation of the statute was not served by refusing Petitioners the opportunity to present a contrary

point of view in response to a continuing series of one sided views which uniformly attack and grossly demean Polish Americans. Such attacks should not be afforded a sanctuary of humor.

Respectfully submitted,

EDMUND A. GODULA
DOMINIK, KNECHTEL, GODULA & DEMEUR
20 North Wacker Drive
Chicago, Illinois 60606
312/726-5344

THADDEUS L. KOWALSKI
120 South LaSalle Street
Chicago, Illinois 60603
312/332-6182
Attorneys for Petitioner

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 74-1412

POLISH AMERICAN CONGRESS and THADDEUS L. KOWALSKI,
Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

AMERICAN BROADCASTING COMPANIES, INC.,
Intervenor.

On Petition to Review an Order of the Federal Communications Commission

Argued February 27, 1975—Decided July 23, 1975

Before HASTINGS, *Senior Circuit Judge,* CUMMINGS and STEVENS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This petition asks us to set aside an order of the Federal Communications Commission denying the complaint of petitioners that American Broadcasting Companies, Inc., ("ABC") violated the Federal Communications Commission's fairness doctrine and personal attack rule by refusing petitioners air-time to respond to an August 10, 1972, broadcast of the Dick Cavett Show containing Polish jokes.

During the program in question, comedian Bob Einstein, masquerading as Gil Drabowski, president of an imaginary Polish Anti-Defamation League, told four "Polish jokes," all denigrating the intellectual or motor skills or personal hygiene standards of Poles. The show was hosted by comedian Steven Allen. The setting was an interview of Einstein by Allen regarding a fictitious lawsuit against the three television networks brought by Drabowski on behalf of his organization, demanding a public apology for Polish jokes told on the networks and endeavoring to make sure that there would be no more Polish jokes broadcast by the networks. Thereafter, in jest, Drabowski gave the four objectionable jokes assailed by petitioners, as examples of those shown by the networks for which his organization thought an apology was required.[1] As a result of a protest by petitioners and others, on the following evening, Steven Allen explained that Einstein's comedy sketch involving Polish jokes was intended to amuse "just as the 'All in the Family' show, which is the No. 1 show in the country, intends to amuse when it does jokes about the Polish, Italians, and every group in the world." Allen then stated that he, Bob Einstein and ABC apologized to those who were offended. Although Allen indicated that he had invited a spokesman for a protesting Polish American organization to "speak his piece" during the August 11th show, no such spokesman appeared.

On October 4, 1972, petitioners wrote ABC requesting "equal time" to reply "under Federal Communications Commission Regulations" to the August 10th telecast. ABC replied as follows on October 31st:

> "We are sorry that anything said or done by either Steve Allen or Bob Einstein offended you. The following evening Steve Allen apologized on behalf of himself, Mr. Einstein and the ABC Television Network.

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1. Subsequently, "Billy," a member of the ABC orchestra, and Allen retold Einstein's fourth joke by making it applicable to Germans and Poles. After the ensuing laughter, Einstein left the stage and Allen "fired" Billy.

"No harm or malice towards Polish-Americans was intended and we are most sincerely regretful that you were hurt or offended.

"For your information, 'equal time' under Section 315 of the Communications Act is limited in scope to candidates for public office and, accordingly, we respectfully decline your 'equal time' request."

Eight months thereafter, petitioners filed a complaint with the Commission, requesting it to rule under the personal attack rule of the fairness doctrine and under the fairness doctrine itself that petitioners were entitled to equal time or a reasonable opportunity to respond free of charge on the ABC network "to the personal attacks on the character, intelligence, hygiene or appearance of members of the Polish American community, an identifiable group," on the August 10th telecast. The complaint contended that demeaning and defamatory attacks in the guise of ethnic humor constituted a controversial issue of public importance "because such programming represents a single, warped and negative point of view which has an enormous influence on the viewing audience."

On September 26, 1973, the Commision's Broadcast Bureau denied petitioners' complaint, noting at the outset that Section 326 of the Federal Communications Act (47 U.S.C. § 326) prohibits the Commission from censoring broadcast material.[2] Under the fairness doctrine, the Broadcast Bureau acknowledged that if a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. The Bureau's ruling further stated:

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2. Section 326 of the Federal Communications Act provides:

"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

"It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. The Commission will review complaints to determine whether the licensee can be said to have acted reasonably and in good faith.

"In support of your contention that the broadcast of Polish jokes constitutes a controversial issue of public importance, you state that the jokes 'belittle a large segment of the population' by perpetuating a 'dumb Polack image.' However, you have not shown that there is any controversy in this country concerning the intelligence or other qualities of Polish Americans. [Footnote omitted.] Accordingly, we are unable to find from the evidence presently before us that ABC was unreasonable in concluding that the broadcast of the jokes and attendant remarks did not constitute the discussion of a controversy of public importance.

* * * * *

"Since we have determined that the network was not unreasonable in concluding that no controversial issue of public importance was involved, the broadcast of the Polish jokes could not constitute, under the Commission's rules, a personal attack. In order for the personal attack rule to be applicable, the attack must occur during the discussion of a controversial issue of public importance. Section 73.123(a) of the Commission's Rules and Regulations. Even had a controversial issue of public importance been involved here, it does not appear that these jokes and attendant remarks could have constituted a personal attack under the Commission's rules. The statement of a particular view, however strongly or forcefully made, does not necessarily constitute a personal attack. *The Port of New York Authority,* 25 FCC 2d 417 (1970). To qualify under the Commission's rule, the attack must reflect upon the 'honesty, character, integrity or like personal qualities' of a person or group and not merely reflect upon ability, knowledge or like intellectual or motor skills."

Subsequently, the petitioners applied to the full Commission for a review of the Broadcast Bureau's ruling. The application

was denied. 46 F.C.C.2d 124 (1974). Again the Commission reminded petitioners that Section 326 of the Act prohibits it from interfering with broadcasters' rights of free speech. After expressing its approval of the Broadcast Bureau's ruling that no controversial issue of public importance had been shown, the Commission echoed the Bureau's alternate rationale that the personal attack rule only applies where an attack is made "upon the honesty, character, integrity or like personal qualities of an identified person or group." Even assuming that a controversial issue of public importance had been involved, the Commission held that the personal attack rule does not apply to these jokes because there was no "attack on those personal qualities bearing on the moral rectitude or personal credibility of the named individual or group," citing *Rome Hospital and Murphy Memorial Hospital,* 40 F.C.C. 2d 452, 453 (1973). This petition for review followed.

Fairness Doctrine and Personal Attack Rule

The fairness doctrine evolved by the Commission requires a broadcaster to devote a reasonable percentage of broadcasts to the coverage of public issues, and that coverage must provide an opportunity for the presentation of contrasting points of view. See *In Re the Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act,* 48 F.C.C.2d 1, 7 (1974). In 1959 the fairness doctrine was recognized in an amendment to 47 U.S.C. § 315(a).[3] As stated by the Supreme Court, under the fairness

3. Section 315(a) of the Act provides in part:

"Nothing in the foregoing sentence [dealing with equal opportunity for appearances by legally qualified candidates for public office on broadcasting stations] shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance" (47 U.S.C. § 315(a)). See *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367, 380-383.

doctrine "The broadcaster must give adequate coverage to public issues [citation omitted] and coverage must be fair in that it accurately reflects the opposing views." *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 377; see also *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94, 111; *Democratic National Committee* v. *Federal Communications Commission*, 460 F.2d 891, 899 (D.C. Cir. 1972), certiorari denied, 409 U.S. 843; *In Re Obligations of Broadcast Licensees Under the Fairness Doctrine*, 23 F.C.C.2d 27, 28 (1970).

The rule on personal attacks, like that on political editorials, is a Commission rule setting out an aspect of the fairness doctrine. See *Red Lion, supra*, at 383-386. The personal attack rule's application is specifically confined to a situation where the attack occurs "during the presentation of views on a controversial issue of public importance."[4] The confinement of the rule's application to "controversial issues of public importance" parallels an identical limitation on the application of the more general fairness doctrine. See *Columbia Broadcasting System*,

4. The personal attack facet of the fairness doctrine was incorporated into a rule in 1967 and provides in pertinent part:

> "(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities." 47 C.F.R. § 73.679 (1974). See 47 C.F.R. §§ 73.123, 73.300 and 73.598 (all identical to § 73.679).

The obligations upon the broadcaster under the personal attack rule differ from those imposed by the general fairness doctrine in that under the former "the broadcaster does not have the option of presenting the attacked party's side himself or choosing a third party to present that side." *Red Lion, supra*, at 378. The attacked party himself must be given an opportunity to respond. See *Democratic National Committee, supra*, at 902.

supra, at 111-112; *Healey* v. *Federal Communications Commission*, 460 F.2d 917, 920, 922 (D.C. Cir. 1972); *Democratic National Committee, supra*, at 900-901; *Green* v. *Federal Communications Commission*, 447 F.2d 323, 327, 329 (D.C. Cir. 1971); *Obligations of Broadcast Licensees, supra*, at 28; Loevinger, "Free Speech, Fairness and Fiduciary Duty in Broadcasting," 34 Law and Contemp. Prob. 278, 285 (1969). Therefore, in order for petitioners to establish the right to a reply under either the general fairness doctrine or the particular personal attack rule, they must show that views on a controversial issue of public importance were set forth in the assailed broadcast.

This Court cannot make a *de novo* determination whether one side of a controversial issue of public importance was presented by the skit on the August 10th Dick Cavett Show. The licensee, in applying the fairness doctrine, is required to make reasonable judgments in good faith on the facts before it. Thus while petitioners are of course correct about the poor taste of the jokes in question, under the fairness doctrine and the personal attack rule, the Commission's order must be upheld if the Commission properly determined that ABC's conclusion that the broadcast did not involve a controversial issue of public importance was not unreasonable nor in bad faith. See *Columbia Broadcasting Systems, supra*, at 118-119, 124, 127, 131; *Democratic National Committee, supra*, at 900-903; *Larus & Brother Co.* v. *Federal Communications Commission*, 447 F.2d 876, 879 (4th Cir. 1971); *Green* v. *Federal Communications Commission, supra*, at 329-330; *Neckritz* v. *Federal Communications Commission*, 446 F.2d 501, 502 (9th Cir. 1971); *In Re Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598, 599 (1964).

Had petitioners successfully established before the Commission that the challenged segment of the broadcast constituted the presentation of views on a controversial issue of public importance, they would then be required to demonstrate that ABC's overall

approach to the subject was unbalanced. See, *e.g., Democratic National Committee, supra,* at 902-903. Since the Commission upheld ABC's determination that no statement on a controversial issue of public importance occurred, our inquiry is limited to whether petitioners have made the necessary threshold showing that ABC's determination that the August 10th program did not involve a discussion of a controversial issue of public importance was either unreasonable or in bad faith. We hold they have not.[5]

The Commission's Determination that ABC Acted Reasonably and in Good Faith

In the present case, ABC decided that the Polish joke material contained in the August 10th Dick Cavett Show did not present a controversial issue of public importance. Thus in its opposition to the application for review before the full Commission, ABC formally contended that the comedy skit on the August 10th show did not represent a discussion of a controversial issue of public importance. The Commission concluded that ABC acted reasonably and in good faith in making this determination because petitioners had not shown there was any controversy in this country concerning the intelligence or other qualities of Polish Americans. Even petitioners recognize "that broadcasters have discretion in deciding whether a controversial issue of public importance exists and their latitude may be wide" (Reply Br. at 6). Neither the Commission nor we should encroach upon this determination by ABC in the absence of an abuse of its discretion. *Democratic National Committee, supra,* at 906.

Petitioners do not assert that ABC lacked good faith. Thus the thrust of their argument is that the network's determination that there was no discussion of a controversial issue of public importance in the August 10th Polish joke skit was unreasonable.

5. Because of this holding, we need not review the Commission's alternate ruling under the personal attack rule that the jokes did not constitute an attack "upon the honesty, character, integrity or like personal qualities of an identified person or group" within the meaning of that rule.

In order to invoke the fairness doctrine, a petitioner must first define the issue which it maintains is a controversial one of public importance. *Green* v. *Federal Communications Commission, supra,* at 329. In the complaint and application for review before the Commission, in the briefs here, and at oral argument we searched in vain for petitioners' statement of the issue. We have found no clear statement of a question that could serve as an issue around which an important public controversy could form. In petitioners' letter to ABC, they simply requested "equal time" to reply to the August 10th show wherein Steve Allen and Bob Einstein allegedly "defamed Polish Americans." In the July 2, 1973, complaint to the Commission, the attempts to state the issue were as follows:

> "Under the Fairness Doctrine, the broadcasting of personal attacks, the depiction of Polish persons or culture in a demeaning manner, the broadcasting of ethnic 'humor' that is insulting to the intelligence, character, hygiene, or appearance of these persons is a controversial issue of public importance because such programming represents a single warped and negative point of view which has an enormous influence on the viewing audience. The televising of so-called 'Polack jokes' is *per se* a controversial issue of public importance, harmful and insulting to a considerable segment of the American population.
>
> * * * * *
>
> "The Federal Communications Commission is therefore requested to rule that the 'Polack jokes' on the Dick Cavett Show, hosted by Steve Allen, on August 10 and 11, 1972 constitute a controversial issue of public importance because such jokes in and of themselves belittle a large segment of the population, both young and adult."

After the Bureau's ruling that there was no discussion of a controversial issue of public importance on the August 10th show, the application for review before the full Commission was filed, containing these statements about the issue:

> "The Staff action supported the view of the licensee that promulgating such humor [Polish jokes] is not a contro-

versial issue of public importance, and that complainants did not present evidence that the issue in such a controversy of public importance.

* * * * *

"The group attacked is large, in excess of ten million Polish Americans. The issue is one of public importance as a result of mere numbers alone. It is controversial because the unanswered 'Polack joke' does, tends to, or is likely to belittle the Polish American in our society."

Reading the pleadings before the Commission leniently, two possible issues are suggested by these excerpts: (1) whether Poles or Polish Americans are inferior to other human beings in terms of intelligence, personal hygiene, etc.; or (2) whether "promulgating" Polish jokes by broadcasting them (if promulgation can be inferred from mere broadcasting) is desirable. Nowhere in the complaint or application for review before the Commission is there a clear statement of the issue which is alleged to be both controversial and of public importance. It would be improper to require the licensee and the Commission to ferret out the critical issue, since petitioners bear the burden of putting the issue forward in a manner that makes it possible for the exercise of discretion as to whether the fairness doctrine or personal attack rule has been properly invoked. Nevertheless, we need not rely on petitioners' failure to state the issue clearly, because the Commission was correct in ruling that ABC did not overstep its discretion in failing to find a controversial issue of public importance, even if we regard the above two issues as properly suggested in the complaint and application for review.

Petitioners allege nothing that would support a contention that there is a controversy over the issue whether Poles or Polish Americans are less intelligent, less clean, less coordinated, etc. than other people. If some people do seriously assert the inferiority of Poles and Polish Americans, it was unreasonable for ABC to decide that they have not generated enough support for their position to raise a controversial issue of public im-

portance. Even if such a debate existed, we could not say that a determination by ABC that the broadcast of the skit in question did not constitute a discussion of this issue was unreasonable. In any event, the record satisfied us that petitioners did not seek to convince the Commission that the skit presented views on such a question.

Assuming that petitioners asserted the question whether broadcasting Polish jokes is desirable, they still failed to demonstrate that there is a controversy of public importance over that issue. In an attempt to show that a controversial issue of public importance was aired on August 10th, petitioners cite the news coverage afforded the filing of the complaint in this case. Many newspapers across the country carried a wire service story describing the action filed with the Commission. All newsworthy events do not constitute controversial issues of public importance. *Healey* v. *Federal Communications Commission, supra,* at 922. Moreover, the newsworthy event covered by the papers was not the Polish joke skit, but a filing of a complaint by petitioners before the Commission. The complaint was filed almost eleven months after the broadcast. To the extent that news stories might reflect on the existence of a controversial issue of public importance, the "fairness doctrine requires a current judgment," so that the passage of the eleven months from the broadcast might well have caused the Commission to discount the relevance of the news stories. *Larus & Brother Co., supra,* at 881, 883.

In assailing the licensee's decision, petitioners also rely on the denunciation of Polish jokes by various individuals and groups, including resolutions by the city government of Hartford, Connecticut, and the United States House of Representatives. Such condemnations do not cause a skit containing Polish jokes to become a discussion of a controversial issue of public importance. No contrary resolutions or other disagreements with the essence of the resolutions are cited from which the Commission or ABC might deduce that a controversy existed over the desirability of broadcasting Polish jokes. Even

if we assume that the skit constituted a statement favoring the broadcasting of Polish jokes, it was reasonable to conclude that such an endorsement does not create a public issue requiring a response, where nothing suggests that such an issue existed before the broadcast.

Petitioners cite an informal survey of children in the sixth grade responding to the question "What does Poland or Polish mean to me?" Although some the responses reflect a negative view of Poles, they say nothing about a public controversy over the desirability of broadcasting Polish jokes. Assuming that the survey demonstrates that Polish jokes may have an unhealthy influence on the attitudes of the young toward Polish people, the survey fails to suggest in any way that a public controversy existed at the time of the broadcast over any issue which may reasonably be said to be raised by the pleadings before the Commission.

Finally, we reject petitioners' contention that ABC's action in requiring Steve Allen, on the August 11th show, to apologize to those who were offended by the previous night's skit demonstrates that there was a controversial issue of public importance discussed. Television networks are rightfully concerned about the ethnic sensibilities of their audiences. Good public relations in issuing an apology to those who took offense at a segment of a broadcast is not the same as acknowledging that a controversial public issue was discussed. Concern for ethnic sensibilities on the part of the networks is laudable, but the Commission has not been empowered to turn ethnic sensibilities into law.[6]

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6. See *Wall Street Journal* editorial, "Polish Jokes," of July 27, 1973.

It should also be noted that Steve Allen made it clear on both the August 10th and 11th broadcasts that the skit was intended to amuse. ABC has also so stated. While petitioners do not approve of such attempts at humor, they do not contend that the skit was intended as other than comedy. Certainly, humorous intent should not be an absolute insulator from the fairness doctrine or personal attack rules, for a presentation of views on a controversial issue of public importance might be very effectively couched in a humorous or satirical setting. Nevertheless, the intent of the broadcast may be relevant to the determination whether one side of a controversial issue of public importance has been presented.

This Court's conclusion that petitioners have failed to show that the August 10th skit presented a controversial issue of public importance should not be read to preclude the future success of a similar petition. The licensee and the Commission must make the determination whether such a controversy exists with reference to the time of the broadcast. *Larus & Brother Co., supra,* at 881, 883. Thus it is conceivable that an important public controversy could arise over the desirability of broadcasting Polish jokes at some time after the telecast relevant to this suit. Of course, if a telecast that is challenged in the future consists of the mere recitation of Polish jokes, rather than a serious discussion of an issue, petitioners would be required to prove that merely relating such jokes constituted a presentation of views on, or a discussion of, a controversial issue of public importance.

Since we cannot agree with petitioners that the broadcast of these jokes constituted a presentation of views on a controversial issue of public importance, the Commission's order is affirmed.[7]

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

7. *National Broadcasting Co.* v. *Federal Communications Commission,* .....F.2d ..... (D.C. Cir. 9/27/74, No. 73-2256), involves the fairness doctrine in a situation where the Commission rejected the licensee's determination that an opportunity to reply was not required. A majority of the panel thought the Commission erred and reversed. Rehearing *en banc* was first granted (December 13, 1974) and then the Court *en banc* remanded the case to the original panel, reinstating their opinion, for consideration of mootness (March 18, 1975). Judge Bazelon filed a lengthy dissent from the *en banc* order remanding the case. In an order released July 11, 1975, the panel on remand vacated their original judgment reversing the Commission and remanded the case to it for dismissal of the fairness complaint. The Commission had requested this action after determining that the passage by Congress of certain legislation had removed the need for a response to the challenged broadcast. Much of the disagreement among the judges of the District of Columbia Circuit in *National Broadcasting Co.* stemmed from the Commission's reversal of the licensee's decision. Such a reversal did not occur in the instant case. Thus, while we have examined the opinions of the various judges, it has not been necessary for us to refer to them in disposing of this case.

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

Sep. 26, 1973

In Reply Refer to:
8330-R
C7-184

Thaddeus L. Kowalski, Esq.
Polish-American Congress, Inc.
1200 North Ashland Avenue
Chicago, Illinois 60622

Dear Mr. Kowalski:

This is in response to your June 28, 1973 complaint against television programs broadcast by ABC.

You allege that ABC violated the Commission's personal attack rule during the August 10, 1972 broadcast of the Dick Cavett Show by attacking "the character, intelligence, hygiene or appearance of members of the Polish American community." You state that the controversial issue of public importance involved was the "demeaning and defamatory attacks in the guise of ethnic 'humor'." Additionally, you contend that ABC failed to notify you of the alleged attack or to provide a copy of the script within seven days, or to offer you a reasonable opportunity to respond, pursuant to the Commission's personal attack rule. You state that a so-called "apology" made by Steve Allen on the Dick Cavett Show of August 11, 1972 was actually "the basis for more demeaning humor."

You also claim that ABC has violated the fairness doctrine by failing to present in its overall programming "opposing views on the issue of defamation of Polish Americans." You state that "the 'Polack jokes' on the Dick Cavett Show, hosted by Steve Allen, on August 10 and 11, 1972 constitute a controversial

issue of public importance because such jokes in and of themselves belittle a large segment of the population." Specifically, you contend that the jokes disseminate the "dumb polack image, i.e., lack of intelligence, lack of personal hygiene, comic apparel and obnoxious features." Further, you state that humor is an "important propaganda tool" and does not lessen the public importance of the issue, and you cite a resolution introduced in Congress, calling for the cessation of "television programs that defame, stereotype, ridicule, demean or degrade any ethnic or religious group."

In its October 31, 1972 letter to you, ABC denied that any "harm or malice toward Polish-Americans was intended." ABC stated that Steve Allen apologized for any offense the following night, August 11, 1972, and it declined your "equal time" request.

The selection and presentation of specific program material are responsibilities of the station licensee, and under the provisions of Section 326 of the Communications Act the Commission is specifically prohibited from censoring broadcast material. However, if a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. This policy, known as the fairness doctrine, requires a broadcast licensee to encourage and implement the broadcast of contrasting views in its overall programming which, of course, includes statements or actions reported on news programs. Thus, both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of any individual to broadcast his views. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. The Commission will review complaints to determine whether the licensee can be said to have acted reasonably and in good faith.

In support of your contention that the broadcast of Polish jokes constitutes a controversial issue of public importance, you state that the jokes "belittle a large segment of the population" by perpetuating a "dumb Polack image." However, you have not shown that there is any controversy in this country concerning the intelligence or other qualities of Polish Americans.[1] Accordingly, we are unable to find from the evidence presently before us that ABC was unreasonable in concluding that the broadcast of the jokes and attendant remarks did not constitute the discussion of a controversy of public importance.

However, we believe an additional comment is appropriate here. Programs containing criticism, ridicule or humor concerning the religious beliefs, race or national background of persons or groups are sometimes the subjects of complaints received by the Commission.[2] Such broadcast matter, however offensive it may sometimes be, also enjoys the protection of the Constitutional guarantees of free speech. As the Commission stated, in part, in its Memorandum Opinion and Order of January 22, 1964, concerning the license renewal of the *Pacifica Foundation* stations (36 FCC 147, 149):

> We recognize that as shown by the complaints here, such provocative programming as here involved may offend some listeners. But this does not mean that those offended have the right, through the Commission's licensing power, to rule such programming off the airwaves. Were this the case, only the wholly inoffensive, the bland, could gain access to the radio microphone or TV camera. No such drastic curtailment can be countenanced under the Constitution, the Communications Act, or the Commission's policy, which has consistently sought to insure "the main-

1. You submit the solicited statements of some 80 sixth-grade students purporting to show anti-Polish bias. However, a number of these letters expressed the writers' disapproval of the image projected by the Polish jokes.

2. In fiscal year 1973, the Commission received some 333 complaints which charged racial or ethnic criticism, ridicule or degradations in the television field.

> tenance of radio and television as a medium of freedom of speech and freedom of expression for the people of the Nation as a whole" (*Editorializing Report*, 13 FCC 1246, 1248). In saying this, we do not mean to indicate that those who have complained about the foregoing programs are in the wrong as to the worth of these programs and should listen to them. This is a matter solely for determination by the individual listeners. Our function, we stress, is not to pass on the merits of the program—to commend or to frown.

Since we have determined that the network was not unreasonable in concluding that no controversial issue of public importance was involved, the broadcast of the Polish jokes could not constitute, under the Commission's rules, a personal attack. In order for the personal attack rule to be applicable, the attack must occur during the discussion of a controversial issue of public importance. Section 73.123(a) of the Commission's Rules and Regulations. Even had a controversial issue of public importance been involved here, it does not appear that these jokes and attendant remarks could have constituted a personal attack under the Commission's rules. The statement of a particular view, however strongly or forcefully made, does not necessarily constitute a personal attack. *The Port of New York Authority*, 25 FCC 2d 417 (1970). To qualify under the Commission's rule, the attack must reflect upon the "honesty, character, integrity or like personal qualities" of a person or group, and not merely reflect upon ability, knowledge or like intellectual or motor skills.

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

In re complaint of THADDEUS L. KOWALSKI, ESQ. and ANTI-DEFAMATION COMMISSION OF THE POLISH AMERICAN CONGRESS, INC. against AMERICAN BROADCASTING COMPANIES, INC.	FCC 74-314 10735

MEMORANDUM OPINION AND ORDER

Adopted: March 28, 1974; Released: April 3, 1974

By the Commission: Chairman Wiley abstaining from voting.

1. The Commission has before it an Application for Review of the Broadcast Bureau's ruling of September 26, 1973, filed October 29, 1973 by Thaddeus L. Kowalski, in his individual capacity, and on behalf of the Anti-Defamation Commission of the Polish American Congress, Inc. (hereinafter Petitioners). Also before the Commission are an Opposition to the Application for Review filed on November 14, 1973 by American Broadcasting Companies, Inc. (ABC); and Petitioner's reply to said oppposition, filed December 3, 1973.

2. In their June 28, 1973 complaint, Petitioners alleged that ABC violated the Commission's personal attack rule during the August 10, 1972 broadcast of the Dick Cavett Show by attacking "the character, intelligence, hygiene or appearance of members of the Polish American community" by means of so-called "Polack jokes." Petitioners further alleged that the controversial issue of public importance involved was the

"demeaning and defamatory attacks in the guise of ethnic 'humor'." Petitioners also claimed that ABC violated the fairness doctrine by failing to present in its overall programming "opposing views on the issue of defamation of Polish Americans." Specifically, Petitioners contended that the "Polack jokes" broadcast on the Dick Cavett Show disseminate the "dumb polack image, i.e., lack of intelligence, lack of personal hygiene, comic apparel and obnoxious features."

3. We have examined the pleadings herein and believe that the Bureau's ruling was correct for the reasons stated therein. However, we believe that certain matters raised in the instant case merit some comment.

4. No matter how much it may disagree with a certain matter, the Commission is prohibited, under Section 326 of the Communications Act from censoring broadcast material or from promulgating any regulation which would interfere with freedom of expression by broadcasting. With the exception of appearances by legally qualified candidates for public office and other matters specifically covered by statute, the Commission does not interfere in the selection of particular program material, nor may it either prohibit or compel the broadcast of any particular program. *National Citizens Committee for Broadcasting*, 42 FCC 2d 1060 (1973). As the Commission has stated:

> It is the judgment of the Commission, as it has been the judgment of those who drafted our Constitution and of the overwhelming majority of our legislators and judges over the years, that the public interest is best served by permitting the expression of any views that do not involve "a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance or unrest." *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949); *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942); *Ashton* v. *Kentucky*, [384 U. S. 195], 34 L. W. 4398 (1966). This most assuredly does not mean that those who uphold this principle approve of the opinions that are expressed under its protection. On the contrary, this principle insures that the most diverse and opposing opinions

> will be expressed, many of which may be even highly offensive to those officials who thus protect the rights of others to free speech. If there is to be free speech, it must be free for speech that we abhor and hate as well as for speech that we find tolerable or congenial. *Anti-Defamation League of B'nai B'rith*, 4 FCC 2d 190, 191-2 (1966).

5. We agree with the Bureau's ruling that ABC was not unreasonable in concluding that the broadcast of the jokes herein and attendant remarks did not constitute the discussion of a controversy of public importance. Consequently, neither the fairness doctrine nor the personal attack rule may be applied in the instant case. Regarding the personal attack rule, it applies only where an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group during the presentation of views on a controversial issue of public importance. 47 C.F.R. § 73.679. See *Fairness Primer*, 29 Fed. Reg. 10415, 10420 (1964). Even if a controversial issue of public importance was involved in the matter about which petitioners complained, the personal attack rule would not apply to the language here cited. The text and prior application of the personal attack rule clearly indicate that the operation of the rule was to be predicated upon an attack on those personal qualities bearing on the moral rectitude or personal credibility of a named individual or group. *Rome Hospital and Murphy Memorial Hospital*, 40 FCC 2d 452, 453 (1973).

6. For the foregoing reasons, pursuant to Section 1.115(i) of the Commission's Rules and Regulations, the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
/s/ VINCENT J. MULLINS
Vincent J. Mullins
Secretary

APPENDIX

Personal Attacks Broadcast August 10, 1972 by Guest Host Steve Allen on the Dick Cavett Show.

"Why does it take one hundred Polacks to paint a house?" And then he said "one to hold the brush and ninety-nine to turn the house." (Laughter)

The woman said, "How can you tell a Polack from an ape?" And the answer was "the ape peels the banana before he eats it."

"How did a Polack get fifty-five holes in his head?" And then he said, "learning to eat with a fork." (Laughter)

What happened when the Polish traveling salesman spent the night in the farmer's barn?" And the man with him said, "I don't know." And he said, "the [pig] got up and went to the house". (Laughter)

"Why does it take one hundred Germans to paint a house?" "One German to hold the brush and ninety-nine Polacks to turn the house.—"

MICHAEL REESE HOSPITAL AND MEDICAL CENTER
Babette and Emanuel Mandel Clinic
29th Street and Ellis Avenue • Chicago, Illinois 60616

Telephone:
Area Code (312) 791-1234

December 4, 1973

Eugene L. Slotkowski, M.D.
5330 West Devon Avenue
Chicago, Illinois 60646

Dear Gene:

Thank you very much for your letter of September 24. I cannot tell you how strongly I agree with your statements about "Polack" jokes.

From a professional standpoint, I am convinced that there is no question but that television and other media beamed at children does produce an effect. As a matter of fact, if this were not the case, I doubt whether any manufacturer would ever buy advertising time. The effect of derogatory statements about ethnic groups can only serve to produce a negative image where none previously existed or to reinforce such feelings that may have already been harbored by other family members. In short, I believe that no pediatrician would condone the kind of slurs that you and I so strongly condemn.

Aside from strictly professional considerations, there is also the question of violation of elementary human ethical standards. After all, the material incorporated through the eyes and reaching the central nervous system must be analogous to the food that passes through the mouth and into the digestive system. In other words, we are not only what we eat, but what we see. At this particular time of growing natonal disunity, it seems to me that continued dissemination of books and other statements

prejudicial to minority groups represents a major threat to our immediate stability as a people as well as to our long range concerns for international peace.

Please feel free to use this letter as you see fit. In response to your final question, I would be willing to testify in person before the FCC and to meet with your attorney, Mr. Kowalski, if he feels I can be of further assistance in this very significant issue.

Sincerely,

/s/ ROBERT S. MENDELSOHN, M.D.
Robert S. Mendelsohn, M.D.
Associate Professor, Department of Preventive Medicine and Community Health University of Illinois School of Medicine

RSM/dk

FILED
JAN 6 1976
MICHAEL RODAK, JR., CLERK

No. 75-593

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

POLISH AMERICAN CONGRESS and
THADDEUS L. KOWALSKI,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA

and

AMERICAN BROADCASTING COMPANIES, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR AMERICAN BROADCASTING COMPANIES, INC. IN OPPOSITION

JAMES A. McKENNA, JR.
CARL R. RAMEY
1150 Seventeenth Street, N.W.
Washington, D. C. 20036

Attorneys for American Broadcasting Companies, Inc.

Of Counsel:

McKENNA, WILKINSON & KITTNER
1150 Seventeenth Street, N.W.
Washington, D. C. 20036

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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BRIEF FOR AMERICAN BROADCASTING COMPANIES, INC. IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals affirming the decisions of the Federal Communications Commission (hereinafter "Commission") is reported at 520 F.2d 1248 (1975) and is reprinted in the Appendix to the Petition

herein at pages A1-A14. The letter ruling of the Commission's Broadcast Bureau is reported at 42 FCC 2d 1110 (1973) and reproduced in the Appendix at pages A15-A18; and the *Memorandum Opinion and Order* of the Commission upholding the Broadcast Bureau's ruling is reported at 46 FCC 2d 124 (1974) and reproduced in the Appendix at pages A19-A21.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1975. The petition for certiorari was filed within ninety days thereafter. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether the court of appeals committed error in affirming the decisions of the Federal Communications Commission which found that American Broadcasting Companies, Inc. (hereinafter "ABC") made a reasonable determination that the specific program material in question did not constitute the discussion of a controversial issue of public importance and, as such, did not invoke either the Fairness Doctrine or the Commission's Personal Attack regulations.

STATEMENT OF THE CASE

ABC believes that the pertinent facts leading to the decision by the court of appeals are succinctly and adequately set forth in the introductory material to that ruling. Accordingly, we rely on that portion of the lower court's synopsis of the proceeding which is reproduced in Petitioner's Appendix at pages A1-A5.

With regard to the substantive holding of the lower court, it may simply be observed that the court of appeals unanimously held that both the Commission and

ABC were reasonable in their determination that the portrayal of Polish joke material during a segment of the "Dick Cavett Show" guest-hosted by Steve Allen did not constitute the discussion of a controversial issue of public importance. This being the case, the court of appeals further found that neither the Fairness Doctrine nor the Personal Attack regulations were brought into play, since an essential prerequisite to application of both the Fairness Doctrine and the Personal Attack regulations is the discussion of a controversial issue of public importance.

ARGUMENT

1. This case presents no issue warranting review by this Court. Review on writ of certiorari is not a matter of right, but is discretionary and granted only where there are special and compelling reasons. See *Fay* v. *Noia*, 372 U.S. 391, 436 (1963). None of the traditional criteria for granting such review is present in this case. The decision below is in no way inconsistent with previous decisions of this Court. It is not in conflict with any other court of appeals decisions. It is not in any other way unusual or novel. On the contrary, it represents a standard application of long-held principles of communications law. Indeed, rather than demonstrating special and important reasons for review by this Court, Petitioners merely repeat arguments advanced first before the Commission and subsequently in the court of appeals, apparently under the mistaken assumption that this is merely another level of review to which they are entitled. See *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178 (1938). All of the arguments presented here were carefully considered and correctly resolved by the court below, and since there is no issue which warrants the attention of this Court, certiorari should be denied.

2. This case is also singularly inappropriate for review by this Court because the court below explicitly limited its holding to the unique facts presented. It accepted the Fairness Doctrine and the Personal Attack corollary as it found them. It also accepted and followed guidelines upheld by this Court in previous rulings involving the Fairness Doctrine and the Personal Attack rules, applying them to a new set of facts in a manner that is entirely consistent with all known precedent in this area. See, *e.g.*, *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367 (1969); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973). Moreover, the decision below did not even preclude Petitioners from raising the matter anew in future litigation should the circumstances they are concerned about develop anew. Thus, while the court below could not find that there had been a discussion of a controversial issue of public importance in this case, it did note that ". . . it is conceivable that an important public controversy could arise over the desirability of broadcasting Polish jokes at some time after the telecast relevant to this suit." (App. 13)

3. While there has been some vacillation by Petitioners as to the specific issue in question, it is beyond dispute that throughout this litigation Petitioners have argued that the mere presentation of a Polish joke on a broadcast station, *per se*, represents a *discussion* of a controversial issue of public importance, thereby potentially bringing into play both the Fairness Doctrine and the Personal Attack regulations. ABC, the broadcast licensee in this case, made the judgment that the presentation of the Polish joke material in question did not involve the discussion of a controversial issue of public importance. The two Commission decisions upheld this determination and the court of appeals decision upheld the Commission decision. The Petition merely seeks the Supreme Court's

final decision on this judgment. The six "questions" that are identified by the Petitioners (Petition, pages 2-3) as being involved not only highlight the general overall insubstantial nature of the Petition, but reflect the specific absence of any showing of valid reasons for review by this Court.

4. Petitioners argue that the court of appeals decision unreasonably "contracted" the meaning of the Personal Attack rule and ignored the "public interest" mandate of the Communications Act of 1934, as amended—presumably referring to the codification of the Fairness Doctrine in Section 315(a) of that statute. Petitioners then seem to suggest that there is something particularly unusual or unfair in the position of the court of appeals that they are not entitled to an opportunity to respond "unless such an attack is made during a discussion of a controversial issue . . ." (App. 5). To hold that a discussion of a controversial issue must take place before either the Fairness Doctrine or the Personal Attack regulations are involved is not a new addition to this basic area of the law. It neither "contracts" nor expands the law to abide by this requirement; rather it is a matter that is essential to both the Fairness Doctrine and the Personal Attack regulations and, in fact, is incorporated in the very rule and statement of policy which have been approved by this Court in *Red Lion*.

5. In essence, Petitioners continue to assert that the mere "recitation of . . . Polish jokes is the presentation of one view on a controversial subject which is of major importance" (Petition, page 6). To so hold, as the Commission and court below correctly concluded, would vastly extend the Fairness Doctrine and Personal Attack regulations. Petitioners want a special recognition for Polish jokes in the sense that, unlike other issues, the mere mention of the topic would constitute the presentation on one side of an issue. The word "discussion" would no longer

be relevant in these terms since isolated and fleeting references of a certain sort would stand alone as the "presentation" of an issue. It is in this context that the Petitioners assert that a Polish joke is an attack in and of itself and that this attack should be deemed controversial once it is "published" by a broadcaster. In their words, ". . . why cannot the mere recitation of this joke be deemed an issue of public importance since up to about 10 percent of the American population are characterized in the most unequivocal and demeaning terms?" (Petition, pp. 6-7). A sizable segment of the population may object to the characterization of many points, themes and references occurring in different forms of broadcast programming—but neither the mere portrayal or characterization itself, nor the adverse reaction or objection of a defined segment of the public, standing alone, can make a matter either controversial or of public importance.

6. Petitioners also argue that neither the Government nor ABC has ever attempted to argue that broadcasting of Polish jokes is only an incidental or rare occasion. Having said this, Petitioners then jump to the conclusory view that the broadcasting of such material involves what is characterized as "repeated activities" which Petitioners say can be acknowledged by this Court. First of all, this case involved only certain specific references on one telecast. Whether or not such activities are "repeated" on other networks and stations and to what extent, is simply a matter that heretofore has not even been an issue, much less demonstrated on the record. In fact, as noted by the court of appeals, even in this isolated and limited case, ABC apologized for the incident in question. While we do not contend that such material has not infrequently occurred on the broadcast medium in some context, it is a totally unwarranted and unfair position for Petitioners to now assert that this Court should take review because the alleged attacks are repeatedly and continuously broad-

cast. In short, there is no record evidence to support this allegation and it goes beyond the facts of the case.

7. Finally, the Petitioners suggest that there is nothing in the general field of humor nor of ethnic humor which is comparable to the Polish joke. While this point also seems to tr nscend the proscribed boundaries of this case, even as evaluated on its own terms the allegation is erroneous. Indeed, the contention that the Polish joke should be treated uniquely and covered by the Fairness Doctrine and the Personal Attack regulations underscores one of the greatest difficulties of this case. That difficulty involves the potential intrusion of First Amendment freedoms normally accompanying program decision-making in the broadcast field. In other words, to attach a Personal Attack or Fairness Doctrine significance to this kind of program material inhibits not only its use, but the use of similar material in a variety of circumstances. The inevitable consequence of so expanding the potential scope of the Fairness Doctrine and Personal Attack regulations would be to subject a much wider spectrum of entertainment programming to governmental intervention. If the Fairness Doctrine or Personal Attack regulations were to be applied in these circumstances we believe it would be very difficult to preclude their application to a whole host of general entertainment themes, satire, comedy sketches, and sterotype references. We believe that the court of appeals implicitly recognized these difficulties and, for that and other reasons, properly confined its ruling to the traditional application of Fairness Doctrine and Personal Attack principles.

CONCLUSION

The decision below, constituting an affirmance of the determination of a regulatory agency reasonably reached, is correct; there is no conflict of decisions; and no questions warranting further review are present. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

JAMES A. MCKENNA, JR.
CARL R. RAMEY
1150 Seventeenth Street, N.W.
Washington, D. C. 20036

Attorneys for American Broadcasting Companies, Inc.

Of Counsel:

MCKENNA, WILKINSON & KITTNER
1150 Seventeenth Street, N.W.
Washington, D. C. 20036

January, 1976

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-593

POLISH AMERICAN CONGRESS
AND
THADDEUS L. KOWALSKI, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. On August 10, 1972, the American Broadcasting Companies, Inc., network ("ABC") televised a comedy skit which contained jokes about Polish nationals (Pet. App. A1-A2). Petitioners, the chairman and members of the Anti-Defamation Commission of the Polish-American Congress, requested ABC to furnish time to reply to the telecast. ABC denied the request, but expressed regret that petitioners were offended by the telecast (*id.* at A2-A3).

Petitioners then filed a complaint with the Federal Communications Commission in which they alleged that the telecast constituted a demeaning and defamatory attack upon Polish nationals and Polish Americans in the guise of ethnic humor and, as such, was a controversial issue of public importance, and that ABC's denial

of their request to reply to the August 10 telecast violated the Commission's fairness doctrine and personal attack rule. Petitioners requested that the Commission rule that petitioners were entitled to equal time or a reasonable opportunity to respond to the August 10 telecast (Pet. App. A1, A3).

The Commission's Broadcast Bureau denied relief on the ground that ABC's decision that the telecast did not involve a controversial issue of public importance was neither unreasonable nor made in bad faith (Pet. App. A15-A18). The Commission upheld the Bureau's ruling (Pet. App. A19-A21).

The court of appeals affirmed (Pet App. A1-A14). The court first noted that the fairness doctrine and the personal attack rule apply only when a controversial issue of public importance is discussed, and that therefore the issue before it was whether the Commission "properly determined that ABC's conclusion that the broadcast did not involve a controversial issue of public importance was not unreasonable nor in bad faith" (Pet. App. A7). The court then concluded that petitioners had failed to introduce any evidence which indicated that ABC's judgment was either unreasonable or made in bad faith (*id.* at A8).[1]

2. The fairness doctrine requires that radio and television broadcasters afford reasonable opportunity for the discussion of contrasting views on controversial issues of public importance. *In the Matter of Obligations of Broad-*

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[1]The Bureau had found that even if a controversial issue of public importance had been discussed, the jokes at issue would not constitute a "personal attack" since they did not reflect upon the "'honesty, character, integrity or like personal qualities' of a person or group," as the rule contemplated (Pet. App. A18). Because of its ruling that the challenged program did not discuss a controversial issue of public importance, the court of appeals did not reach this alternate basis of the Commission's dismissal of petitioners' complaint (Pet. App. A8, n. 5).

cast Licensees Under the Fairness Doctrine, 23 F.C.C. 2d 27, 28. The rule on personal attacks requires that broadcasters provide a personal right of response to the person or group whose "honesty, character, integrity or like personal qualities" are impugned "during the presentation of views on a controversial issue of public importance." 47 C.F.R. 73.679.

As this Court noted in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 111, since such requests for time under the fairness doctrine and personal attack rule require the resolution of many difficult factual issues, "[t]he broadcaster * * * is allowed significant journalistic discretion in deciding how best to fulfill the Fairness Doctrine obligations" within guidelines prescribed by the Commission. Moreover, to lessen the danger of governmental intrusion into areas of First Amendment concern, the Commission has refrained from substituting its judgment for that of the licensee, and has limited its function to determining "whether the licensee can be said to have acted reasonably and in good faith." *Applicability of the Fairness Doctrine*, 29 Fed. Reg. 10415, 10416, 40 F.C.C. 598, 599; *Fairness Report*, 48 F.C.C. 2d 1. The courts have upheld this allocation of responsibilities. See, *e.g.*, *Democratic National Committee* v. *Federal Communications Commission*, 460 F. 2d 891, 900 (C.A.D.C.), certiorari denied, 409 U.S. 843; *Columbia Broadcasting System*, *supra*, 412 U.S. at 118-119, 124, 127, 131; *Democratic National Committee*, *supra*, 460 F. 2d at 900-903.[2]

In the instant case, the Commission correctly determined that ABC had acted reasonably and in good faith

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[2]See also *Larus & Brother Co.* v. *Federal Communications Commission*, 447 F.2d 876 (C.A. 4); *Green* v. *Federal Communications Commission*, 447 F.2d 323, 329-330 (C.A. D.C.); *Neckritz* v. *Federal Communications Commission*, 446 F.2d 501, 502 (C.A. 9); *Applicability of the Fairness Doctrine*, *supra*, 40 F.C.C. at 599.

in deciding that the August 10 broadcast raised no controversial issue of public importance. Petitioners presented no evidence that either the status of Polish nationals and Polish-Americans or jokes concerning such groups was a controversial issue of public importance. The fact that many Polish nationals or Americans of Polish descent find such jokes offensive does not itself make their broadcast a controversial issue of public importance. Cf. *Healey* v. *Federal Communications Commission*, 460 F. 2d 917, 922 (C.A.D.C.).

Television Station WCBS-TV, 8 F.C.C. 2d 381, petition for reconsideration denied, 9 F.C.C. 2d 921, affirmed *sub nom. Banzhaf* v. *Federal Communications Commission*, 405 F.2d 1082 (C.A.D.C.), certiorari denied *sub nom. Tobacco Institute, Inc.* v. *Federal Communications Commission*, 396 U.S. 842, upon which petitioners primarily rely, is inapposite. There, on the basis of overwhelming evidence that cigarette smoking endangered public health, the Commission found that cigarette advertising constituted a controversial issue of public importance, and that therefore broadcasters must provide substantial time for the presentation of contrary views. Petitioners did not make a comparable showing that broadcasting of jokes concerning Polish nationals constitutes such an issue.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

THOMAS E. KAUPER,
Assistant Attorney General.

BARRY GROSSMAN,
Attorney.

ASHTON R. HARDY,
General Counsel,

DANIEL M. ARMSTRONG,
Acting Associate General Counsel,

JACK D. SMITH,
Counsel,
Federal Communications Commission.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-593

POLISH AMERICAN CONGRESS AND THADDEUS L. KOWALSKI,

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA AND AMERICAN BROADCASTING COMPANIES, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY TO OPPOSING MEMORANDA OF RESPONDENTS

EDMUND A. GODULA
DOMINIK, KNECHTEL, GODULA & DEMEUR
20 North Wacker Drive
Chicago, Illinois 60606
312/726-5344

TUADDEUS L. KOWALSKI
120 South LaSalle Street
Chicago, Illinois 60603
312/332-6182

Attorneys for Petitioner

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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I. REPLY TO OPPOSING MEMORANDUM OF THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA

The Commission relies on the view that the broadcaster has wide discretion in determining whether request to respond under the Fairness Doctrine of the Personal Attack Rule should be granted. The Commission then argues that the Seventh Circuit Court of Appeals noted that Petitioners had failed to introduce any evidence which indicated that ABC's judgment was either unreasonable or made in bad faith.

But who can deny that such discretionary activity is anything but a *conclusionary* exercise. What was the basis of the broadcaster's conclusion? What was the basis of the Commission finding that the broadcaster's conclusion was reached in good faith and was reasonable? The record will show that such conclusions are supported only by feeble braces, namely, that the jokes were intended to amuse, they were humorous and that they were not broadcast in the context of a controversial discussion of public importance.

These faulty braces should be upset and the unwarranted conclusion should be allowed to crumble in view of the uncontradicted facts that the Polish jokes are uniformly and unswervingly demeaning of nationalistic origins, that children are particular susceptible victims, and that millions of Americans of the attacked national origins protest the brutalizing characterization of these jokes. Is this not more meaningful than self absolving declarations that the jokes were intended only to provide humor, or that they were not sequentially tied to a discussion of a controversial subject?

The record will show that the Seventh Circuit Court of Appeals misstated and misunderstood the record in concluding that Petitioners presented no proof to show that ABC's judgment was unreasonable and made in bad faith. This avoids the essential question whether the mere recitation of these vile, always recognizable stories do not, in and of themselves, constitute a discussion of a controversial subject of public importance; and whether the mere recitation of these obnoxious characterizations do not constitute one view which requires an opportunity to respond in the public interest.

Petitioners ask this Court to answer the critical federal question involved in the Fairness Doctrine: are the Polish Americans entitled to an opportunity to respond to the mere broadcasting of Polish jokes when such jokes take a position that the Polish American is moronic, hygienically inferior and repugnant.

Petitioners ask this Court to meet the critical federal question, involved in the Fairness Doctrine, that humor is not a shield when a group is attacked and they have no opportunity to respond.

Petitioners ask this Court to meet the critical federal question, involved in the Fairness Doctrine, that a demeaning humorous utterance can at one and the same time discuss a controversy and attack a group.

It is Petitioners' view that the mere recitation of the vile Polish jokes is one view of a controversial subject requiring an opportunity to respond; and that a denial of this request is in and of itself an unreasonable decision made in bad faith by the broadcaster and by the Commission.

Petitioners' recourse to the *Cigarette Advertising* case is truly apposite, and embarrassingly relevant to Respondents' position. Petitioners, in the record below, introduced much evidence to support the view that broadcasting of Polish jokes endangered the security of the social presence of the Polish American adult and the Polish American child. The Commission denied Petitioners due process of a hearing to further elaborate on such dangers, and to further corroborate the record it had already made. The Commission and the Seventh Circuit Court of Appeals would place greater weight on the insult to organic tissue by tobacco, than the insult to the social presence of Polish Americans by these atrocious jokes.

II. REPLY TO OPPOSING MEMORANDUM OF THE AMERICAN BROADCASTING COMPANY

Special and compelling reasons do exist for this Court to grant certiorari. ABC is totally wrong in arguing that the Polish joke creates no unusual or novel reason to compel review under the Fairness Doctrine. The decisions by the Commission and Seventh Circuit Court of Appeals did not resolve the issues below, but unfairly paid homage to the discretion of broad-

casters and ignored the injury to a large segment of the population.

No tortured theory is advanced by Petitioners, but the simple compelling issue is again presented before this Court: Is the Polish joke unique and always recognized? Does the Polish joke in each and every instance constitute an attack? Does the framework of the Fairness Doctrine require that an opportunity be given to respond in behalf of substantial numbers of attacked victims? Is the view that an attack must occur in a certain preset context nothing but an intolerable and captious bar to the application of the Fairness Doctrine?

The Seventh Circuit Court of Appeals unrealistically stated that Petitioners were not precluded from raising the matter in new and future litigation, but the restrictions of the Seventh Circuit Court of Appeals renders it impossible for Petitioners to do so. What broadcaster would not accept the invitation of the Seventh Circuit Court of Appeals and avoid broadcasting Polish jokes within a framework of a structured controversial discussion? Fairness requires a response once the Polish joke is broadcast!

The mere recitation of the joke is truly controversial and of public importance, and is so far more than advertisements urging the consumers to smoke cigarettes.

The First Amendment arguments are certainly frivolous if not actually deceitful. Respondents say that allowing Polish Americans to respond to maligning humor will somehow "inhibit" general entertainment themes. Grouping the always vicious Polish joke among "general entertainment themes" is an impertinent attitude. This Court has recognized the hollowness of the censorship charge in the *Red Lion* case. Allowing the Polish American an opportunity to respond to the social injuries perpetrated by the Polish joke will have the same effect on humor, in general, which the *Cigarette Advertising* case had on advertising, in general. The simile is self-proving.

III. CONCLUSION

The Seventh Circuit Court of Appeals totally ignored Petitioners' argument based on the public interest aspect of the Fairness Doctrine, and based its opinion solely on the personal attack corrollary, denying Petitioners relief because of the unreasonableness in requiring the Polish joke to somehow flare up during a discussion of a controversial issue. Formalism in the support of substance is admirable, but formalism which rejects substance blocks the pursuit of rightful remedies. Broadcasting the uniquely characterized Polish joke is an unequivocal stand on a controversial subject; and it is further an unmistakable attack. There has been no consideration of the Fairness Doctrine by this Court which calls more positively for its application than the present case.

Respectfully submitted,

EDMUND A. GODULA
DOMINIK, KNECHTEL, GODULA
& DEMEUR
20 North Wacker Drive
Chicago, Illinois 60606
312/726-5344

TUADDEUS L. KOWALSKI
120 South LaSalle Street
Chicago, Illinois 60603
312/332-6182
Attorneys for Petitioner